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An individual and d/b/a Gotham Garage

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DC Comics,

Plaintiff,

v.

Mark Towle, an individual and d/b/a
Gotham Garage, and Does 1 – 10,
inclusive,

Defendants.

Case No. CV11-3934 RSWL (OPx)

NOTICE OF MOTION AND
MOTION TO DISMISS CLAIM OF
COPYRIGHT INFRINGEMENT
PURSUANT TO FRCP 12(b)(6).

HEARING DATE: January 25, 2012
TIME: 10:00 a.m.
COURTROOM 21

BEFORE THE HONORABLE
RONALD S.W. LEW

TO ALL PARTIES HEREIN AND TO THEIR RESPECTIVE ATTORNEYS
OF RECORD:

Please take notice that on January 25, 2012 at 10:00 a.m. in the Court of Judge
Ronald S.W. Lew, located in Courtroom 21, 312 N. Spring Street, Los Angeles, CA,
Defendant Mark Towle ("Defendant") will move the Court for dismissal of the cause
of action for copyright infringement, pursuant to Rule 12(b)(6) of the Federal Rules
of Civil Procedure, for the following reasons:

1 1) Plaintiff is suing defendant for copyright infringement of an automobile
2 and automobile designs cannot be copyrighted.

3
4 2) Plaintiff is not, and does not claim to be, the copyright holder to the 1966
5 Batman television series, or any of the subsequent motion pictures that the
6 automobiles first appeared in.

7
8 3) None of the Batmobiles were separately registered for copyright.

9 4) The Batmobiles that Defendant is accused of infringing were subject to
10 design patents which have long since expired.

11
12 This motion will be based on this Notice of Motion and Motion, the
13 Memorandum of Points and Authorities filed herewith, the Request for Judicial
14 Notice filed concurrently herewith, the First Amended Complaint and the pleadings
15 and papers filed herein.

16
17 This motion is made following the conference of counsel pursuant to L.R. 7-3
18 which took place on December 6, 2011.

19
20 Date: December 16, 2011

Law Office of Larry Zerner

21 By: _____

22 Larry Zerner

23 Attorney for Plaintiff

TABLE OF CONTENTS

INTRODUCTION	1
II. FACTUAL BACKGROUND	2
III. STANDARDS GOVERNING MOTIONS TO DISMISS	3
IV. AUTOMOBILES ARE NOT COPYRIGHTABLE.....	4
V. PLAINTIFF IS NOT AND DOES NOT CLAIM TO BE THE COPYRIGHT OWNER OF THE BATMAN TELEVISION SERIES OR ANY OF THE BATMAN MOTION PICTURES.....	8
VI. THE 1966 BATMOBILE AND THE 1989 BATMOBILE WERE SUBJECT TO DESIGN PATENTS THAT HAVE LONG SINCE EXPIRED.	12
VII. PLAINTIFF SHOULD BE ALLOWED TO AMEND THE COMPLAINT ONLY ON CERTAIN NARROW CONDITIONS	13
VIII. CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<i>Ashcroft v. Iqbal</i> , 200 U.S. 321, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)	4
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)	3, 4
<i>Durham v. Tomy</i> , 630 F.2d 905, 915 (2nd Cir. 1980)	7, 11
<i>Mendiondo v. Centinela Hosp. Med. Ctr.</i> , 521 F.3d 1097, 1104 (9th Cir. 2008)	3

Statutes

17 U.S.C. § 113(b):	7
17 U.S.C. §101	5
Federal Rule of Civil Procedure 12(b)(6)	3
Federal Rule of Civil Procedure 8(a)(2)	3

Other Authorities

H.Rep.No. 1476, 94th Cong., 2d Sess. 55 (1976), U.S. Code Cong. & Admin. News 1976, p. 5668	7
House Comm. on the Judiciary, 87th Cong., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (1961)	7

I. INTRODUCTION

It is a well settled principle of law that useful articles, such as toasters, silverware, and automobiles are not copyrightable. While many useful articles incorporate creative design elements, bestowing copyright on such designs would give patent-like protection to these utilitarian objects, without requiring the additional review performed before a patent is granted. This would result in protection for works that are neither novel nor non-obvious.

DC Comics, however, seems to believe that this well established rule, that automobiles are not copyrightable, does not apply if it merely alleges that the automobile first appeared in a comic book.¹ DC sued Mr. Towle for copyright infringement for selling working replica automobiles that resemble the Batmobile and claims that the design of the Batmobiles is protected by copyright.

However, while there may be no dispute that DC owns the copyright to Batman, Robin, Joker, Riddler, Penguin, and all the other flamboyant characters in their superhero universe, one thing should be absolutely clear, for the following reasons, DC does not and cannot own a copyright for an automobile that looks like the Batmobile.

- 1) Automobile designs cannot be copyrighted and are not protected by copyright

2) DC is not, and does not claim to be, the copyright holder to the 1966 Batman television series, or any of the subsequent motion pictures in which the Batmobiles first appeared.

3) None of the Batmobiles were separately registered for copyright.

4) The Batmobiles that Mr. Towle is accused of infringing were subject to design patents which have long since expired.

For these reasons, to the extent that DC is claiming that Mr. Towle infringed its' copyright by selling replica Batmobile automobiles, it has failed to state a claim against Mr. Towle.

II. FACTUAL BACKGROUND

As Plaintiff alleges right at the beginning of the First Amended Complaint ("FAC"), "Defendant's business is actively producing, selling, offering for sale, renting, and distributing unlicensed and counterfeit replica vehicles and kits comprised of assorted parts and accessories, which incorporate unauthorized reproduction of fanciful vehicles copyrighted . . . by DC Comics . . . including . . the various BATMOBILE vehicles. . . ." FAC, ¶1.

The most famous Batmobile appeared in the 1966 television series starring Adam West (FAC ¶8) and other Batmobiles appeared in various films beginning in 1989 (FAC ¶9). DC claims that all the Batmobile Vehicles, and specifically the

¹ If this were true then Ford, Toyota and GM would have gone into the comic book business long ago.

1 1966 Batmobile are “DC Comics Copyrighted Designs” (FAC ¶11) and that DC has
 2 obtained certificates of registration “for works in which each of the DC Comics
 3 Copyrighted Designs appear” and that the relevant copyright registrations are
 4 attached as Exhibit “A” to the FAC.
 5

6 DC alleges that Mr. Towle has infringed DC’s copyright by manufacturing,
 7 distributing, selling, offering for sale or rent, unauthorized or counterfeit automobiles
 8 which incorporate DC Comics Copyrighted Designs, including the design of the
 9 various Batmobiles. (FAC ¶25). DC then requests in the prayer for relief that Mr.
 10 Towle be enjoined from selling any automobiles that are not authorized by DC
 11 Comics. (FAC Prayer ¶1a.)
 12
 13

14 III. STANDARDS GOVERNING MOTIONS TO DISMISS

15
 16 Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain “‘a short
 17 and plain statement of the claim showing that the pleader is entitled to relief,’ in
 18 order to give the defendant fair notice of what the . . . claim is and the grounds upon
 19 which it rests.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167
 20 L.Ed.2d 929 (2007). Pursuant to Federal Rule of Civil Procedure 12(b)(6), a
 21 defendant may seek dismissal of a complaint for failure to state a claim upon which
 22 relief can be granted. A court may grant such a dismissal only where the plaintiff
 23 fails to present a cognizable legal theory or to allege sufficient facts to support a
 24 cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097,
 25 1104 (9th Cir. 2008).
 26
 27
 28

1 To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain more
 2 than labels and conclusions” or “a formulaic recitation of the elements of a cause of
 3 action.” *Twombly*, 550 U.S. at 555; *see also Ashcroft v. Iqbal*, 200 U.S. 321, 129
 4 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (“Rule 8 . . . does not require ‘detailed
 5 factual allegations,’ but it demands more than an unadorned, the-defendant-
 6 unlawfully-harmed-me accusation.”). In other words, the plaintiff must articulate
 7 “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550
 8 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content
 9 that allows the court to draw the reasonable inference that the defendant is liable for
 10 the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949. “The plausibility standard is not
 11 akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a
 12 defendant has acted unlawfully” or “facts that are ‘merely consistent with’ a
 13 defendant’s liability.” *Id.*

14
 15 In conducting the above analysis, a court must accept all factual allegations as
 16 true even if doubtful in fact. *Twombly*, 550 U.S. at 555. However, “the tenet that a
 17 court must accept as true all of the allegations contained in a complaint is
 18 inapplicable to legal conclusions.” *Iqbal*, 129 S.Ct. at 1949.

24 IV. AUTOMOBILES ARE NOT COPYRIGHTABLE

25 It is undisputable that automobiles, even automobiles that have been reproduced
 26 in comic books, are not subject to copyright protection. The reason for this is that
 27
 28

1 automobiles are considered to be “useful articles” and “useful articles” are not
2 subject to copyright protection.
3

4 “A ‘useful article’ is an article having an intrinsic utilitarian function that is not
5 merely to portray the appearance of the article or to convey information.” 17 U.S.C.
6 §101.
7

8 “The design of a useful article, as defined in this section, shall be considered a
9 pictorial, graphic, or sculptural work only if, and only to the extent that, such design
10 incorporates pictorial, graphic, or sculptural features that can be identified separately
11 from, and are capable of existing independently of, the utilitarian aspects of the
12 article.” *Id.*
13

14 That automobiles are useful articles and are not copyrightable is an entirely non-
15 controversial idea. It is only DC Comics that believes that this rule does not apply to
16 the Batmobile. On the Copyright Office website, one can find an article on “Useful
17 Articles” that states:
18
19

20 “A “useful article” is an object that has an intrinsic utilitarian function that is not
21 merely to portray the appearance of the article or to convey information. Examples
22 are clothing; automobile bodies; furniture; machinery, including household
23 appliances; dinnerware; and lighting fixtures. An article that is part of a useful
24 article, such as an ornamental wheel cover on a vehicle, can itself be a useful
25 article.” (<http://www.copyright.gov/fls/fl103.html>). (Emphasis Added.)
26
27
28

1 Nor does it matter that the Batmobile design may be more aesthetically
2 satisfying or valuable than that of a less exotic looking car.
3

4 “The House Report on the 1976 Act emphasizes that the definition of
5 "pictorial, graphic, and sculptural works" was intended "to draw as clear a line as
6 possible between copyrightable works of applied art and uncopyrighted works of
7 industrial design."
8

9 ‘Although the shape of an industrial product may be aesthetically satisfying
10 and valuable, the Committee's intention is not to offer it copyright protection
11 under the bill. Unless the shape of an automobile, airplane, ladies' dress, food
12 processor, television set, or any other industrial product contains some element
13 that, physically or conceptually, can be identified as separable from the
14 utilitarian aspects of that article, the design would not be copyrighted under the
15 bill. The test of separability and independence from "the utilitarian aspects of
16 the article" does not depend upon the nature of the design, that is, even if the
17 appearance of an article is determined by aesthetic (as opposed to functional)
18 considerations, only elements, if any, which can be identified separately from the
19 useful article as such are copyrightable. And, even if the three-dimensional
20 design contains some such element (for example, a carving on the back of a chair
21 or a floral relief design on silver flatware), copyright protection would extend
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1 only to that element, and would not cover the overall configuration of the
2 utilitarian article as such.”

3
4 *Durham v. Tomy*, 630 F.2d 905, 915 (2nd Cir. 1980) *quoting* H.Rep.No. 1476,
5 94th Cong., 2d Sess. 55 (1976), U.S. Code Cong. & Admin. News 1976, p. 5668
6 (Emphasis added).

7
8 The Congressional record preceding the adoption of the Copyright Act sets forth
9 the following examples of the limitation expressed by 17 U.S.C. § 113(b):

10
11 “Under distinctions indicated in existing court decisions, that the copyright in a
12 work portraying a useful article as such would not protect against manufacture of
13 that article, *copyright protection would not extend* to the following cases:

- 14 - A copyrighted drawing of a chair, used to manufacture chairs of that design;
15
16 - *A copyrighted scale model of an automobile, used to manufacture*
17 *automobiles of that design;*
18
19 - A copyrighted technical drawing showing the construction of a machine used to
20 manufacture the machine;
21
22 - A copyrighted picture of a dress, used to manufacture the dress.

23
24 House Comm. on the Judiciary, 87th Cong., Report of the Register of Copyrights
25 on the General Revision of the U.S. Copyright Law (1961). (Emphasis Added).
26
27
28

1 The record is clear not only that useful articles are not copyrightable but that
2 automobiles are often given as the textbook example of an item that can be
3 aesthetically pleasing and require design, but not subject to copyright protection. The
4 Batmobile is no more subject to copyright protection than would the Bat Coffee pot
5 or the Bat Pencil.
6

7
8 Please note that Mr. Towle is not being accused of selling drawings of the
9 Batmobile, or toy models of the Batmobile. Mr. Towle is accused of selling full
10 scale, working, automobiles that resemble the Batmobile. As such, they are
11 absolutely considered to be useful articles.
12

13
14 Attached to the Request for Judicial Notice as Exhibits “1” “2” and “3” are true
15 and correct copies of photographs of the Batmobile from the 1966 television series,
16 the 1989 motion picture and the 1995 Motion Picture. Plaintiff requests that the court
17 take judicial notice of these photographs.
18

19 As the court can see from viewing the photographs of the Batmobiles, the design
20 of the cars themselves are not copyrightable, nor are they severable. Accordingly, to
21 the extent that Plaintiff is claiming that reproductions of the Batmobiles constitute
22 copyright infringement, it has failed to state a claim.
23

24
25 V. PLAINTIFF IS NOT AND DOES NOT CLAIM TO BE THE COPYRIGHT
26 OWNER OF THE BATMAN TELEVISION SERIES OR ANY OF THE
27 BATMAN MOTION PICTURES.
28

1 Even if the Court were to accept that the Batmobiles from the 1966 television
2 program or the various motion pictures are entitled to copyright protection, DC
3 cannot claim copyright infringement to these automobiles because DC is not the
4 copyright claimant to either the 1966 television program or any of the motion
5 pictures. In Exhibit “A” to the FAC, DC lists 34 different properties it claims Mr.
6 Towle may have infringed. As copyright registration is a prerequisite to filing a
7 lawsuit for copyright infringement, Plaintiff must show that it has registered (or at
8 least applied for registration) to whatever material Mr. Towle is accused of
9 infringing. However, notably missing from the list of copyrighted items on Exhibit
10 “A” are any claims to either the 1966 Batman television series, or any of the
11 subsequent Batman motion pictures. The reason for this is simple. DC Comics is
12 not the copyright claimant to either the television series or the motion pictures. The
13 copyright claimants to the television series are Greenway Productions, Inc., and
14 Twentieth Century-Fox Television, Inc. The copyright claimant to the various
15 motion pictures is either Warner Brothers or Warner Brothers Pictures. Attached to
16 the Request for Judicial Notice as Exhibits “4” through “8” are true and correct
17 copies of the copyright registrations for the 1966 television series² and the motion
18 pictures. Judicial Notice of these facts is hereby requested.

26
27 ² With regard to the 1966 Television Series, attached is the copyright record for the
28 first episode of the series, “Hi Diddle Riddle.” If the court would like the copyright
records for all 120 episodes, they can be provided. However, it does not appear to be
in dispute that DC Comics is not the copyright owner of the television series or the

1 DC appears to be arguing that the appearance of a version of the Batmobile in
2 the Batman comics, was sufficient for it to claim copyright in the automobiles that
3 appeared in the television programs and the motion pictures, despite the fact that the
4 Batmobile in the comic books prior to the 1966 television show did not look like the
5 Batmobile in the television program.
6

7
8 In Exhibit "A" to the FAC, DC has only listed two comic books that existed
9 prior to the television program, *Batman* comic #170, and *Detective Comics* #337,
10 both from March 1965. Attached to the Request for Judicial Notice as Exhibits "9"
11 and 10 are true and correct copies of those pages from *Batman* #170 and *Detective*
12 #337 in which the Batmobile is depicted.
13

14
15 Detective #337 only has one partial view of the Batmobile. But in *Batman*
16 #170, which has multiple frames showing the Batmobile, even a careful look shows
17 that there is nothing about the car that would be copyrightable. Furthermore, the
18 Batmobile depicted in *Batman* #170 does not even look like the 1966 Batmobile.
19

20 Nor can DC use images of the Batmobile that were used in comic books after
21 1966 to claim copyright to the Batmobile. As set forth above, DC is not the
22 copyright owner to the television program and did not have a Batmobile that looked
23 like the 1966 Batmobile prior to the show's debut. If, after the show debuted, DC
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28 motion pictures. If it were, it would have certainly included that information in
Exhibit "A" to the FAC.

1 artists used the 1966 Batmobile as a guide for the new Batmobile in the comic book,
2 that would simply constitute a derivative work.

3
4 “The copyright in a compilation or derivative work extends only to the material
5 contributed by the author of such work, as distinguished from the preexisting
6 material employed in the work, and does not imply any exclusive right in the
7 preexisting material. The copyright in such work is independent of, and does not
8 affect or enlarge the scope, duration, ownership, or subsistence of, any copyright
9 protection in the preexisting material.” *Durham v. Tomy*, 630 F.2d 905, 909 (2nd
10 Cir. 1980).

13 In *Durham v. Tomy*, plaintiff and defendant were rival toy manufacturers who
14 each made toy figurines based on the famous Disney characters, Mickey Mouse,
15 Donald Duck and Pluto. Tomy claimed Durham was infringing its’ copyright to the
16 toys. Durham sued for a declaratory judgment that it was not violating Tomy’s
17 rights and Tomy counterclaimed for copyright infringement. *Durham* at 907. The
18 court determined that since Tomy was simply copying the famous images of Mickey
19 Mouse, Donald Duck and Pluto, Tomy’s work was not original enough to claim
20 copyright. “One look at Tomy's figures reveals that, in each, the element of
21 originality that is necessary to support a valid copyright is totally lacking. [Citations
22 Omitted] The three Tomy figures are instantly identifiable as embodiments of the
23 Disney characters in yet another form: Mickey, Donald and Pluto are now
24 represented as small, plastic, wind-up toys.” *Id.* at 908-909.

1 While DC can certainly claim copyright to the drawings and the story
2 incorporated in these comic books, it cannot claim copyright to the pre-existing
3 Batmobile design when it merely copies the 1966 Batmobile into its own comic
4 books (assuming, *arguendo*, that the court first finds that automobile designs are
5 copyrightable.)
6
7

8 VI. THE 1966 BATMOBILE AND THE 1989 BATMOBILE WERE
9 SUBJECT TO DESIGN PATENTS THAT HAVE LONG SINCE
10 EXPIRED.
11

12 As a final reason why the FAC fails to state a cause of action for copyright
13 infringement in the cars, the court may take notice that both the 1966 Batmobile, the
14 1989 Batmobile, and the 1995 Batmobile were all subject to design patents which
15 have expired.
16

17 In 1966, George Barris, the creator of the 1966 Batmobile, filed for and obtained
18 a design patent on the Batmobile, (Patent No. DES 205,998). In 1990, DC Comics
19 obtained a design patent on the 1989 Batmobile (Patent No. DES 311,882). And in
20 1996, DC Comics obtained a design patent on the 1995 Batmobile (Patent No. DES
21 375,704). . Copies of these patents are attached as exhibits 11, 12, and 13. Each of
22 these patents was valid for a term of 14 years and therefore, each of these patents has
23 expired (in 1980, 2004 and 2010, respectively).
24
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1 First, the fact that DC Comics obtained the patents on the 1989 and 1995
2 Batmobiles would indicate that DC understands and agrees that automobile designs
3 are not copyrightable and are not protected under copyright law.
4

5 And second, by filing for a design patent, DC Comics understood that its
6 protection for these designs was limited to the 14 years. DC Comics had its 14 years
7 of protection under the patent laws. Now that the patents have expired, Mr. Towle,
8 and anyone else, has the right to exploit the designs set forth in those patents.
9
10

11 VII. PLAINTIFF SHOULD BE ALLOWED TO AMEND THE COMPLAINT
12 ONLY ON CERTAIN NARROW CONDITIONS
13

14 While the right to amend the complaint is usually liberally granted, the court
15 should note that Plaintiff has already filed an amended complaint. This was after an
16 earlier meet and confer with Defendant's counsel regarding the exact same issues
17 that arose in the FAC. If the court agrees that DC Comics cannot state a cause of
18 action for copyright infringement of an automobile design, then if Plaintiff is given
19 leave to amend it should be required to specifically state 1) precisely what copyrights
20 it reasonably believes Defendant infringed; 2) if Plaintiff believes that Defendant
21 sold or manufactured a product other than an automobile that infringes Plaintiff's
22 copyright, then it should state exactly what that product is. Plaintiff should not be
23 allowed to take advantage of the liberal pleading rules, to simply state vague
24 allegations of infringement (i.e., allegations that Defendant sold "other merchandise
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1 which incorporate the DC Comics Copyrighted Designs” FAC ¶25) without putting
 2 Defendant on notice on precisely what he is accused of selling.
 3

4 VIII. CONCLUSION

5
 6 While it may be amusing to have a case involving the Batmobile, the fact is, this
 7 case is extremely serious to Mr. Towle. His livelihood is making custom cars. He
 8 has relied on the public records showing the expiration of the design patents and the
 9 well settled principals that automobiles are not copyrightable to create his business.
 10 By falsely claiming that the Batmobiles are protected by copyright, and threatening
 11 damages in the complaint of up to \$150,000 per act of infringement (FAC, p. 15),
 12 DC Comics is trying not only to wrongly stop Mr. Towle, but to send a chilling
 13 message to other custom car manufacturers, that they will face a similar fate, should
 14 they try to sell replica Batmobiles, even though the activity is entirely legal.
 15

16
 17 For this reason it is extremely important that this court not let DC go forward
 18 with the infringement claim if it agrees that the Batmobile is uncopyrightable.
 19 Otherwise, DC will simply use its vastly superior financial position to force Mr.
 20 Towle to stop selling a perfectly legal product, and will chill others from doing the
 21 same. DC’s actions constitute copyright misuse and should not stand.
 22

23 Date: December 16, 2011

24 Law Office of Larry Zerner

25 By: _____

26 Larry Zerner

27 Attorney for Plaintiff
 28